

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

In re:

CORE SCIENTIFIC, INC., *et al*,

Debtors.¹

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Chapter 11

Case No.22-90341 (DRJ)

(Jointly Administered)

**GEM MINING’S EMERGENCY MOTION TO
COMPEL ASSUMPTION OR REJECTION OF EXECUTORY
CONTRACTS OR, IN THE ALTERNATIVE, FOR ADEQUATE PROTECTION**

EMERGENCY RELIEF HAS BEEN REQUESTED. RELIEF IS REQUESTED NOT LATER THAN 12:00 P.M. (PREVAILING CENTRAL TIME) ON FRIDAY, APRIL 21, 2023.

IF YOU OBJECT TO THE RELIEF REQUESTED OR YOU BELIEVE THAT EMERGENCY CONSIDERATION IS NOT WARRANTED, YOU MUST APPEAR AT THE HEARING IF ONE IS SET, OR FILE A WRITTEN RESPONSE PRIOR TO THE DATE THAT RELIEF IS REQUESTED IN THE PRECEDING PARAGRAPH. OTHERWISE, THE COURT MAY TREAT THE PLEADING AS UNOPPOSED AND GRANT THE RELIEF REQUESTED.

GEM Mining 1, LLC (“GEM Mining 1”) and GEM Mining 4, LLC (“GEM Mining 4” or, together with GEM Mining 1, “GEM Mining”) respectfully move (this “Motion”) the Court for an entry of an order, substantially in the form attached hereto as **Exhibit A** (the “Proposed Order”), compelling Core Scientific, Inc. (“Core”) and its debtor affiliates (collectively, the “Debtors”) in the above-captioned jointly administered chapter 11 cases (the “Bankruptcy

¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number, are as follows: Core Scientific Mining LLC (6971); Core Scientific, Inc. (3837); Core Scientific Acquired Mining LLC (N/A); Core Scientific Operating Company (5526); Radar Relay, Inc. (0496); Core Scientific Specialty Mining (Oklahoma) LLC (4327); American Property Acquisition, LLC (0825); Starboard Capital LLC (6677); RADAR LLC (5106); American Property Acquisitions I, LLC (9717); and American Property Acquisitions, VII, LLC (3198). The Debtors’ corporate headquarters and service address is 210 Barton Springs Road, Suite 300, Austin, Texas 78704.

Cases”), as debtors and debtors in possession, to determine whether to assume or reject the GEM Mining Contracts (as defined herein) pursuant to 11 U.S.C. § 365(d) no later than the date of the hearing on this Motion,² or, alternatively, granting GEM Mining adequate protection in the form of relieving GEM Mining of the obligation to pay monthly fees in advance under the GEM Mining Contracts. Further, if the Debtors reject the GEM Mining Contracts, the Court should grant GEM Mining relief from the automatic stay to arrange the immediate and orderly retrieval of the Miners (as defined herein) and to cease performance of all obligations under the GEM Mining Contracts. If the Debtors assume the GEM Mining Contracts, the Court should require the Debtors to provide adequate assurance of prompt cure and future performance under the contracts. In support of the Motion, GEM Mining submits the *Affidavit of Joe Poore in Support of GEM Mining’s Emergency Motion to Compel Assumption or Rejection of Executory Contracts or, in the Alternative, for Adequate Protection*, attached hereto as **Exhibit B** (the “Poore Affidavit”), and state as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction to consider this Motion pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

2. The statutory predicate for the relief requested in this Motion is §§ 105, 361, 362, 363, and 365 of the Bankruptcy Code.

² Hereinafter, all code sections refer to title 11 of the United States Code, §§ 101, *et seq.* (the “Bankruptcy Code”) unless otherwise noted.

BACKGROUND

I. The GEM Mining Contracts

3. GEM Mining and Core are parties to those certain Master Services Agreements (the “MSAs”) wherein Core agreed to provide hosting services for computer hardware and other tangible equipment (the “Miners”) at data centers owned or operated by Core or its affiliates (the “Facilities”) as further provided in individual ordering documents (the “Orders”). Specifically Core agreed to provide various services to GEM Mining, including but not limited to, colocation, hosting, rack space, security, monitoring, maintenance, utilities, equipment maintenance and repair, facility management, account management, network and data access, technical support, and heat and thermal management services (collectively, the “Services”). True and correct copies of the MSAs are collectively attached to the Poore Affidavit as Exhibit 1.

4. GEM Mining 1 and Core are currently operating under that certain Amended and Restated Order # 8 (the “GEM Mining 1 Order”), executed on June 8, 2021, wherein Core agreed to host approximately 7,295 Miners for an initial three-year term. In exchange for Core’s hosting services and certain associated equipment, GEM Mining 1 prepaid \$68,568,825.27 and pays Core monthly fees in advance for applicable fees for use of the Facilities and the provision of Services as set forth in the GEM Mining 1 Order. A true and correct copy of the GEM Mining 1 Order is attached to the Poore Affidavit as Exhibit 2.

5. GEM Mining 4 and Core are currently operating under that certain Master Services Agreement Order # 1 (the “GEM Mining 4 Order” or, together with the GEM Mining 1 Order, the “GEM Mining Orders”), executed on July 9, 2021, wherein Core agreed to host approximately 3,105 Miners for an initial three-year term. In exchange for Core’s hosting services and certain associated equipment, GEM Mining 4 prepaid \$30,459,490.40 and pays

Core monthly fees in advance for applicable fees for use of the Facilities and the provision of Services as set forth in the GEM Mining 4 Order. The MSAs and the GEM Mining Orders are collectively referred to herein as the “GEM Mining Contracts.” A true and correct copy of the GEM Mining 4 Order is attached to the Poore Affidavit as Exhibit 3.

II. The Bankruptcy Cases and Core’s Threat to GEM Mining

6. On December 21, 2022 (the “Petition Date”), the Debtors initiated the Bankruptcy Cases by filing voluntary petitions for relief under Chapter 11 of the Bankruptcy Code.

7. Since the Petition Date, GEM Mining has continued to pay monthly fees in advance, along with other charges, as provided in the GEM Mining Contracts. In total, GEM Mining has paid Core \$5,086,676.47 pursuant to monthly invoices since the Petition Date. (*See* Poore Affidavit at ¶ 7).

8. During the Bankruptcy Case, the Debtors have repeatedly indicated that they would reject the GEM Mining Contracts in the Bankruptcy Cases, requested GEM Mining to mutually terminate the GEM Mining Contracts, and demanded GEM Mining to agree to a new contract with a materially higher hosting rate. (*See id.* at ¶ 8).

9. On March 31, 2023, John Warren, Chief Executive Officer of GEM Mining, and Joe Poore, Chief Financial Officer of GEM Mining, had a video conference with Jeff Pratt, Senior Vice President, Growth & Partnerships of Core, and Matt Minnis, Co-Founder and Board Member of Core, at the request of Core to discuss the status of the GEM Mining Contracts. (*See id.* at ¶ 9). During the video conference, Messrs. Pratt and Minnis told Messrs. Poore and Warren that Core would not reject the GEM Mining Contracts. (*See id.*). Instead, Messrs. Pratt and Minnis explained that Core would intentionally shut down GEM Mining’s Miners on April 3,

2023 in violation of the GEM Mining Contracts unless GEM Mining agreed to terminate or renegotiate the terms of the GEM Mining Contracts. (*See id.* at ¶ 9 and Ex. 4).

10. GEM Mining does not desire to terminate the GEM Mining Contracts or negotiate a new agreement.

11. On April 11, 2023, Core sent GEM Mining the invoices for April 2023 (the “April 2023 Invoices”), which includes a prepayment charge of \$1,257,793.62 for May 2023 estimated hosting fees under the GEM Mining Contracts. Pursuant to the April 2023 Invoices, the prepayment is due by April 21, 2023. True and correct copies of the April 2023 Invoices are attached to the Poore Affidavit as Exhibit 5.

12. It is unjust for GEM Mining to bear the risk of continued prepayments to Core so long as Core threatens to breach its agreement by suspending services without notice and refuses to assume or reject the GEM Mining Contracts. Core’s threatened conduct, if executed, constitutes a *de facto* termination of the GEM Mining Contracts.

RELIEF REQUESTED

13. Through this Motion, GEM Mining seeks an order:

- a. Compelling the Debtors to immediately decide whether to assume or reject the GEM Mining Contracts;
- b. If the Debtors assume the GEM Mining Contracts, requiring the Debtors to provide adequate assurance of prompt cure and future performance;
- c. If the Debtors reject the GEM Mining Contracts, granting GEM Mining relief from the automatic stay to arrange the immediate and orderly retrieval of the Miners and cease performance of all obligations under the GEM Mining Contracts; and

- d. If the Court does not compel the Debtors to immediately assume or reject the GEM Mining Contracts, granting GEM Mining adequate protection in the form of relieving GEM Mining of the obligation to pay monthly fees in advance under the GEM Mining Contracts.

BASIS FOR RELIEF

I. The GEM Mining Contracts are executory contracts within § 365.

14. A contract is executory if “performance remains due to some extent on both sides’ and ‘at the time of the bankruptcy filing, the failure of either party to complete performance would constitute a material breach of the contract, thereby excusing the performance of the other party.’” *RPD Holdings, L.L.C. v. Tech Pharmacy Servs. (Matter of Provider Meds, L.L.C.)*, 907 F.3d 845, 851 (5th Cir. 2018), *cert. denied sub nom. RPD Holdings, L.L.C. v. Tech Pharmacy Servs.*, 139 S. Ct. 1347 (2019) (citation omitted); *see also Bonneville Power Admin. v. Mirant Corp. (In re Mirant Corp.)*, 440 F.3d 238, 246 n.13 (5th Cir. 2006) (“[T]he legislative history of § 365(a) indicates that Congress intended the term [executory contract] to mean a contract ‘on which performance remains due to some extent on both sides.’”) (citation omitted).

15. Here, material performance remains due from both the Debtors and GEM Mining. Among other obligations, the Debtors are obligated to provide the Services, and GEM Mining must pay the Debtors for the Services under the GEM Mining Contracts.

16. Because both the Debtors and GEM Mining have ongoing obligations to maintain their business relationship pursuant to the GEM Mining Contracts, the contracts are executory within the contemplation of § 365.

II. Assumption or rejection of the GEM Mining Contracts should be compelled.

17. Section 365(b)(1) provides that a debtor may not assume an executory contract or unexpired lease of a debtor unless, at the time of assumption, the trustee (a) cures, or provides adequate assurance that the trustee will promptly cure, any default; (b) compensates, or provides adequate assurance that the trustee will promptly compensate the agreement counterparty for any actual pecuniary loss resulting from the default; and (c) and provides adequate assurance of future performance under such contract or lease. 11 U.S.C. § 365(b)(1).

18. Section 365(d)(2) permits a counter-party to an executory contract or unexpired lease of personal property to seek entry of an order compelling the debtor-in-possession to assume or reject such a contract or lease by a specified period of time. 11 U.S.C. § 365(d)(2). *see also In re Mirant Corp.*, 440 F.3d 238, 254 (5th Cir. 2006) (recognizing the right of the non-debtor to file a motion to compel assumption or rejection of a lease or executory contract within a specified period of time).

19. While § 365(d)(2) generally “allows the trustee or debtor-in-possession a reasonable time within which to determine whether assumption or rejection of an executory contract would be beneficial to an effective reorganization” it is “not without limits.” *In re Adelphia Commc’ns. Corp.*, 291 B.R. 283, 292 (Bankr. S.D.N.Y. 2003) (quoting other sources). “The determination of what constitutes a reasonable time to assume or reject is within the bankruptcy court’s discretion based on the particular facts of each case.” *Id.* (citing *In re Burger Boys*, 94 F.3d 755, 760 (2d Cir. 1996), *Theatre Holding Corp. v. Mauro (In re Theatre Holding Corp.)*, 681 F.2d 102, 105 (2d Cir. 1982), *In re Teligent, Inc.*, 268 B.R. 723, 738 (Bankr. S.D.N.Y. 2001)). In determining what is a reasonable time for a debtor to decide whether to assume or reject a contract, courts consider the following non-exhaustive list of factors:

- a. the nature of the interests at stake;
- b. the balance of the hurt to the litigants;
- c. the good to be achieved;
- d. the safeguards afforded to the litigants;
- e. whether the action to be taken is so in derogation of Congress' scheme that the court may be said to be arbitrary;
- f. the debtor's failure or ability to satisfy post-petition obligations;
- g. the damage that the non-debtor will suffer beyond the compensation available under the Bankruptcy Code;
- h. the importance of the contract to the debtor's business and reorganization;
- i. whether the debtor has sufficient time to appraise its financial situation and the potential value of its assets in formulating a plan of reorganization;
- j. whether there is a need for judicial determination as to whether an executory contract exists;
- k. whether exclusivity has been terminated; and
- l. above all, the broad purpose of Chapter 11, which is to permit successful rehabilitation of debtors.

20. These factors and the totality of the circumstances weigh in favor of shortening the time in which the Debtors may assume or reject the GEM Mining Contracts. In particular, (a) the Debtors have threatened to intentionally shut down GEM Mining's Miners in violation of the GEM Mining Contracts and deprive GEM Mining of any benefit of the GEM Mining Contracts; (b) under the terms of the GEM Mining Contracts, GEM Mining is required to pay significant monthly fees in advance, which essentially constitutes unsecured-term credit for the Debtors who

are threatening to shut down GEM Mining's Miners to damage GEM Mining; (c) if the Debtors shut down the Miners or reject the GEM Mining Contracts following GEM Mining's advance payment but before Services are provided for the following month, GEM Mining will suffer economic loss that cannot be adequately compensated by the Bankruptcy Code; (d) GEM Mining is handcuffed by the Debtors' apparent strategy to intentionally refuse assuming or rejecting the GEM Mining Contracts because GEM Mining is unable to consider or secure other available hosting facilities until the Debtors assume or reject the contract; and (e) the Debtors have had nearly four months to appraise their financial situation with respect to the GEM Mining Contracts and the potential value of the contracts in formulating a plan of reorganization. Since the Petition Date, the Debtors have repeatedly indicated that they would reject the GEM Mining Contracts in the Bankruptcy Case, requested GEM Mining to mutually terminate the GEM Mining Contracts, and demanded GEM Mining agree to a new contract with a materially higher hosting rate. Now, the Debtors are threatening to take affirmative steps to violate the contracts and damage GEM Mining to coerce GEM Mining to agree to less favorable terms. Thus, it is clear the Debtors have had sufficient time to thoroughly consider their options concerning the GEM Mining Contracts. In short, the Debtors should not be given any additional time to continue leveraging their rights under § 365 of the Bankruptcy Code to threaten GEM Mining with damaging actions in an attempt to coerce a renegotiation of the contracts.

21. For these reasons, the Court should compel the Debtors to assume or reject the GEM Mining Contracts by the date of the hearing on this Motion.

III. If the Debtors assume the GEM Mining Contracts, the Debtors must provide adequate assurance of prompt cure and future performance in a form acceptable to GEM Mining.

22. To the extent the Debtors seek to assume the GEM Mining Contracts, GEM Mining requests the Court require the Debtors to satisfy their burdens under §§ 365(b)(1)(A)-(C) to, among other things, supply GEM Mining adequate assurance of prompt cure and future performance under the GEM Mining Contracts. This is particularly critical here because the Debtors have threatened to take affirmative steps to intentionally and materially breach the contracts and deprive GEM Mining of any benefits under the contracts.

IV. If the Debtors reject the GEM Mining Contracts, relief from the automatic stay should be granted to allow GEM Mining to arrange the immediate and orderly retrieval of the Miners and cease performance of all obligations under the GEM Mining Contracts.

23. Under § 362(d)(1), relief from the automatic stay is appropriate for “cause, including the lack of adequate protection of an interest in property of such party in interest.” 11 U.S.C. § 362(d)(1). Because the Bankruptcy Code does not define cause, the determination of whether to grant relief for cause must be made on a “case by case basis based on an examination of the totality of circumstances.” *In re Kao*, No. 15-31193-H3-13, 2015 WL 9412744, at *2 (Bankr. S.D. Tex. Dec. 21, 2015).

24. In the event the GEM Mining Contracts are rejected, “cause” exists to grant GEM Mining relief from stay under § 362(d)(1) to immediately cease performance of all obligations under the GEM Mining Contracts. The rejection of the contracts is ample cause for relief from stay. *See, e.g., In re Stick Chex Newman One, LLC*, No. 15-11275-WHD, 2016 WL 3135749, *2-4 (Bank. N.D. Ga. May 12, 2016) (granting relief from stay to pursue state court remedies to evict tenant under lease deemed rejected); *In re Henderson*, 245 B.R. 449, 455 (Bankr. S.D.N.Y. 2000) (granting relief from stay to evict debtor due to, among other things, fact that lease was

rejected); *In re Sonora Convalescent Hosp., Inc.*, 69 B.R. 134, 138 (Bankr. E.D. Cal. 1986) (granting relief from stay where lease was deemed rejected).

25. Thus, if the GEM Mining Contracts are rejected, cause exists to grant GEM Mining relief from the automatic stay to allow it to arrange the immediate and orderly retrieval of the Miners and cease performance of all obligations under the GEM Mining Contracts.

26. GEM Mining further requests that a waiver of the 14-day stay of the effectiveness of any order granting relief from the automatic stay pursuant to Rule 4001(a)(3) of the Federal Rules of Bankruptcy Procedure.

V. If the Court does not compel the Debtors to immediately assume or reject the GEM Mining Contracts, the Court should grant GEM Mining adequate protection in the form of relieving GEM Mining of the obligation to pay monthly fees in advance under the GEM Mining Contracts.

27. Section 363(e) of the Bankruptcy Code provides that:

Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest.

11 U.S.C. § 363(e).

28. Courts have held that a non-debtor party to an executory contract or unexpired lease is entitled to adequate protection of its interest pending a debtor's decision to assume or reject the contract or lease. *See In re Braniff Airways, Inc.*, 783 F.2d 1283, 1286-87 (5th Cir. 1986) (noting that adequate protection pursuant to § 363(e) may provide interim relief pending debtor's decision to assume or reject a real property lease); *Matter of Cont'l Airlines, Inc.*, 146 B.R. 520, 525 (Bankr. D. Del. 1992) (noting that a lessor of personal property may request adequate protection payments during the period when the debtor is deciding whether to assume or reject the lease); *In re Charrington Worldwide Enter.*, 98 B.R. 65, 70 (Bankr. M.D. Fla. 1989)

(requiring a debtor to provide adequate protection in the form of a bond in favor of the non-debtor counterparty to an executory contract pending debtor's election to assume or reject executory the contract), *aff'd*, 110 B.R. 973 (M.D. Fla. 1990); *In re Attorneys Office Mgmt., Inc.*, 29 B.R. 96, 98-99 (Bankr. CD. Cal. 1983) (“While the trustee is deciding whether to reject or assume the lease it is using an interest in property. The definition of that interest is broad enough to encompass the protections provided the lessor under § 363(e).”).

29. Here, GEM Mining is entitled to adequate protection for the Debtors’ use of the resources that it provides under the GEM Mining Contracts. Requiring GEM Mining to continue advancing significant funds to the Debtors for Services the Debtors are threatening to withhold unnecessarily and inequitably exposes GEM Mining to economic loss. GEM Mining should not be required to continue prepaying hosting fees to the Debtors under the GEM Mining Contracts without some assurance that those Services will be provided.

30. Adequate protection maintains the status quo between the petition date and confirmation of a plan of reorganization. *In re 354 E. 66th St. Realty Corp.*, 177 B.R. 776, 782 (Bankr. E.D.N.Y. 1995). In preserving the status quo, adequate protection ensures that the non-debtor party’s position will not be impaired during the bankruptcy case. *See, e.g., United States v. Smithfield Estates, Inc. (In re Smithfield Estates, Inc.)*, 48 B.R. 910, 914 (Bankr. D. R.I. 1985); *In re Roe Excavating*, 52 B.R. 439, 440 (Bankr. S.D. Ohio 1984). Absent adequate protection, GEM Mining’s position is at risk of impairment because of the Debtors’ threatened actions.

31. For these reasons, GEM Mining requests that the Court grant GEM Mining adequate protection in the form of relieving GEM Mining of the obligation to pay monthly fees in advance if the Court does not compel the Debtors to immediately assume or reject the GEM Mining Contracts.

CONCLUSION

WHEREFORE, GEM Mining respectfully requests the Court to enter an order, substantially similar to the Proposed Order attached hereto as **Exhibit A**, compelling the Debtors to immediately decide whether to assume or reject the GEM Mining Contracts or, alternatively, granting GEM Mining adequate protection in the form of relieving GEM Mining of the obligation to pay monthly fees in advance under the GEM Mining Contracts. In addition, GEM Mining requests that if the Debtors assume the GEM Mining Contracts, the Debtors are required to provide adequate assurance of prompt cure and future performance, and, if the Debtors reject the GEM Mining Contracts, GEM Mining is granted relief from the automatic stay to arrange the collection of the Miners and cease performance of all obligations under the GEM Mining Contracts. Finally, GEM Mining requests such other, further relief as the Court deems appropriate.

Respectfully submitted this the 13th day of April, 2023.

Respectfully submitted,

BY: /s/ Evan N. Parrott
Evan N. Parrott

*Attorney for Gem Mining 1, LLC and
GEM Mining 4, LLC*

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing on all parties identified on the Debtors' Master Service List attached hereto either via the CM/ECF system, e-mail, or regular mail on this the 13th day of April, 2023.

/s/ Evan N. Parrott
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